United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1158

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

-against-

PHILIP LUBRANO

Defendant-Appellant

Dock. No. 75-1158

PETITION FOR RE-ARGUMENT
AND REHEARING EN BANC

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STATEMENT

Appellant was convicted in the U.S. District Court for the Southern District of New York (Motley, Jr.) on March 27, 1975. This Court affirmed the conviction in an opinion (Slip opinion 1361, December 30, 1975). On January 13, 1976 this Court granted appellant's motion for a stay of the mandate and an enlargement of time within which to file the instant petition. Appellant is presently at liberty pending the disposition of this petition.

ARGUMENT

POINT I

THE COURT MISCONSTRUED BOTH THE NATURE AND THE PURPOSE OF THE AGENT'S HEARSAY TESTIMONY ABOUT HIS INSTRUCTIONS TO THE CONFIDENTIAL INFORMANT.

In his appeal brief appellant argued that the admission of Agent Peterson's testimony relating certain "instructions" he gave to the informant, Tony Finn, was prejudicial hearsay that should have been excluded. This Court, adopting the Government's position, deemed the testimony "relevant to aid the jury in understanding the background events leading up to the crimes in question." Slip Opinion at 1366. We most respectfully take issue with this determination and ask this Court to reconsider its holding.

As a preliminary matter, it is important to note that, as this Court acknowledged, the case against appellant consisted wholly of circumstantial evidence since the only person who could provide any direct evidence of appellant's participation in the crime was unavailable. Clearly, then, whatever information did reach the jury, of which Tony Finn was the source, was certain to have a substantial effect on the jury's determination. This is particularly obvious in light of the prosecutor's repeated reminders to the jury that Tony Finn's absence compelled the Government to resort to the use of secondary evidence, i.e., the agents' observations. Thus, any suggestion that if the admission of the agent's testimony was error it was harmless must be dismissed.

In holding Peterson's testimony relevant background information and thus admissible, the Court cited as authority U.S. v. Ruggiero, 472 F2d 500 (2d Cir., 1973) and U.S. v. Manfredonia, 414 F2d 760 (2d Cir., 1969). However, an in-depth analysis of those two cases will illustrate their inapplicability to this case.

In Ruggiero the defendant was charged with having falsely denied before a grand jury that he had had certain conversations with others regarding the possibility of bribing public officials. The bribery scheme involved numerous other individuals who had sought the defendant as a conduit for the money. During the trial these individuals testified as to certain conversations they had among themselves, and out of the defendant's presence, regarding the objectives of their plan. This testimony was challenged by the defendant as pre-judicial hearsay but the Court rejected the argument on the ground that it was "admissible as relevant proof of background operative facts." 472 F2d at 607. In addition, the Court found that "in view of the proof that [the individuals involved] were confederates or co-conspirators, testimony as to McCarthy's out of court utterances was admissible in the trial judge's discretion even though the indictment did not charge a conspiracy." 472 F2d at 607.

It is obvious that without such background material the jury would have been unable to sift through the complex scheme to determine whether defendant's denials before the grand jury investigating the case were indeed perjurious. In short, absent such testimony, the jury would have been unable to determine the nature and extent of defendant's participation in the scheme. Note, however, that

the out of court declarations were harmless in themselves, as far as the defendant was concerned, and only when viewed in context of the entire series of events did they provide a setting for defendant's actions. Manifestly, even if they had been offered for the truth of what was said, or if the jury took them as such, they could not have unduly prejudiced the jury.

In Manfredonia, defendant was also accused of perjury as a result of false testimony given at a previous trial where he had denied being in the business of accepting wagers. As part of the government's proof, a government agent who had posed as a "big time bettor" and an intermediary who had introduced the agent to defendant were permitted to testify about conversations they had had with each other out of defendant's presence regarding the introduction of the agent to defendant. This Court rejected defendant's contention that the testimony was prejudicial hearsay, holding:

> . . .[T]hese conversations were plainly relevant to show the events leading up to the introduction of [the agent] to Manfredonia. They were only offered for the purpose of showing that[the agent] and Manfredonia met and conversed and not for the truth of what they said to each other. Moreover, the trial court made this clear in its charge when it instructed the jury that such conversations might not be taken as evidence that Manfredonia was at any time engaged in bookmaking. Also, it should be noted that both [out of court declarants] testified in court and were available for cross-examination.
>
> 414 F.2d at 765.

Here again, nothing in the out-of-court declarations was inherently prejudicial, and given the trial court's instructions

it can be safely assumed that whatever weight the jury placed on the substance of the conversations was minimal.

The same cannot be said for the hearsay declarations in this case. To begin with, the substance of agent Peterson's testimony was of a devastating nature and, with or without instructions, the jury could not logically have ignored it since it dealt specifically with the ultimate issue before them, i.e., whether appellant sold drugs to Tony Finn. Thus, notwithstanding the government's assertion to the contrary, the out of court statements were offered for the truth of the matter asserted, that is, that Finn bought cocaine from Lubrano because he was instructed to do so. What other logical inference could the jury draw from those statements? Without the benefit of cross-examination of Finn they could only conclude that, being a paid government informant, he followed his instructions. Clearly, appellant's guilt was determined not on the basis of the surveillance team's observations but on the one piece of evidence that directly linked appellant, at least in the jury's mind, with Tony Finn. Moreover, in the face of agent Peterson's previous testimony that he "developed an informant for the purpose of initiating cases, narcotics cases against narcotic traffickers." (Tr. 86), his later statement that "as a result" of a conversation with Finn the latter was instructed to purchase narcotics from Lubrano opened a pandora's box of speculations as to appellant's status as a drug trafficker. Although well disguised, the purpose of these out of court declarations was to implant in the mind of the jury the notion that Lubrano was a cocaine dealer from

whom a substantial quantity was readily available. Indeed, the jury's verdict highlights this conclusion since by their acquittal on the sale count they discounted the observations of the surveilling agents, upon which that count was based, and instead convicted appellant of some vague conspiracy on the assumption impressed upon them by the hearsay testimony that Lubrano was a major narcotics trafficker.

We fail to perceive what other elucidating factors this testimony contained that would have aided the jury in understanding the background events. We also fail to see that the jury required such information to make a proper determination as to appellant's guilt, since this case, unlike both Ruggiero and Manfredonia, was factually simple. In the final analysis, agent Peterson's hearsay utterances did not aid the jury in their inquiry, it answered the question for them.

Other aspects of this case clearly distinguish it from Ruggiero and Manfredonia and render the principles enunciated therein inapplicable. Here the hearsay declarations were not made by confederates or co-conspirators in furtherance of their crime, as in Ruggiero, but rather by two government operatives, the most crucial of which was unavailable for cross-examination. Cf. Manfredonia.

We believe the case at bar is more akin to Favre v. Henderson, 464 F2d 359 (5th Cir., 1972) and respectfully urge this Court to follow its holding.

In that case defendant was charged with bank robbery. During the government's direct case the arresting officer was permitted to

testify over objection that a confidential informant had given him information that led to defendant's arrest. In holding the statement inadmissible hearsay, the Court stated:

> Whether offered by the prosecutor to establish identification, guilt or both, the testimony, when considered in light of its logical inferences, is hearsay. . . . Although the officer never testified to the exact statement made to him by the informant, the nature of the statements . . . was readily inferred.
>
> 464 F2d at 362.

This is precisely what occurred here.* Indeed, if the various factors considered by the Court in Favre are applied, a similar disposition is compelled in this case.

First of all, Peterson's out of court statement clearly stated an expression about a past fact, i.e., his instructions to Finn, based on their conversation, to purchase cocaine from appellant on which, as we have demonstrated, the jury had to have placed a great deal of emphasis. Secondly, there can be no doubt that had Finn been available to be cross-examined his unreliability would have been exposed, at least to the point of negating the prejudicial effect of his out-of-court statement. Given Finn's criminal background and Agent Peterson's concession that he himself did not trust Finn, a host of motives to lie and falsely implicate appellant might have been exposed. Third, as already noted, the

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*Compare the following colloquy:

> Q. Excuse me. Did Mr. Finn say anything to you when you met him at that pre-arranged location.
> MR. HOCHHEISER: I have to object. . .
> THE COURT: Are you asking him to tell us what Finn said?

(footnote continued on next page)

hearsay evidence was crucial to the government's case and devastating to the defense. Fourth, as conceded by the government and acknowledged by this Court, the total evidence against appellant was purely circumstantial, and although found to be sufficient by this Court, it was far from being overwhelming or even strong.** In fact, without the hearsay declarations, quite simply, the government had no case against appellant. Cf., Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210.

In light of all these factors, we most respectfully suggest that this Court erred in ruling the hearsay admissible. Furthermore, even if limiting instructions had been given it is not reasonable to assume that the jury would have refrained from relying on those statements as direct proof of appellant's guilt.

MR. TIMEBERS: No.
A. We had a conversation. And as a result of this conversation, I gave Mr. Finn $6,400 and instructed him to purchase a quarter Kilogram of cocaine from Mr. Lubrano. (Tr. 274-275)

**In view of the foregoing argument, appellant reasserts his position that the evidence was insufficient to sustain his conviction.

POINT II

THE PROSECUTOR'S SUMMATION, BY REPEATEDLY REFERRING TO THE INFORMANT'S ABSENCE AS A WITNESS, BY INVITING THE JURY TO SPECULATE AS TO WHAT THAT WITNESS WOULD HAVE TESTIFIED TO HAD HE BEEN ALIVE, AND BY IMPLYING TO THE JURY THAT THE DEFENSE WAS PURPOSELY ATTEMPTING TO SUPPRESS EVIDENCE BY THE MANNER IN WHICH THEY POSED THEIR QUESTIONS, DEPRIVED APPELLANT OF A FAIR TRIAL.

During the course of his summation the Assistant United States Attorney stated:

> Any difficulty there is in this case results from the fact that, completely beyond anybody's control, the key person in the case, Tony Finn, is not here available to testify and tell you what what happened.
>
> You noticed that during the trial the defense lawyers were very careful to ask each witness, "of your own knowledge." They didn't want you to hear what Tony Finn could have told you about what happened in these transactions.
>
> (Tr. 890-891)

Defense counsel presented a vigourous objection which was promptly overruled. The prosecutor continued:

> But in general our case is based on what we considered at the time to be our secondary or back up source of proof.
>
> * * * * *
>
> Therefore, you have to bear with us to the extent that we can not tell you all the things that Tony Finn could tell you if he was here.
>
> (Tr. 891)

* * * * *

> Let me move on to the May 10 and 11 transaction. You remember that in-between this Vitale meets Finn up at the Lucky's Bar under the Whitestone Bridge, but unfortunately since we don't have Finn here to testify, we can't present to you what was said during that conversation up at Lucky's Bar. You have to use you [sic] common sense and see how that conversation fits into the proper relation of these drug deals that you have heard in evidence.
>
> (Tr. 901)

Although these comments were not presented as a seperate issue on appeal before this Court, there was some reference to them in appellant's brief (see footnote, page 30.). But, in any event, because they patently deprived appellant of his constitutional right to a fair trial there must be a thorough re-examination of this most critical issue.

It is black letter law that in the prosecution of criminal cases the United States Attorney must always be cognizant of his responsibility to see that justice is done. To that extent, his zeal to win "his" case must be tempered by considerations of fair play and the rules of evidence which were designed for that purpose. At this point in our constitutional development there is no necessity to cite cases that delineate the boundaries of proper prosecutorial conduct. It is sufficient to note, as this Court has said, that "the exceedingly fine line which distinguishes permissible advocacy from improper excess is to be determined within the concrete terrain of specific cases." United States v. White, 486 F2d 204 (2d Cir., 1973).

We believe that in this case the prosecutor traversed that line and entered the realm of "improper excess.".

To begin with, his allusion to some defense scheme to suppress evidence by prefacing their questions with "Of your own knowledge" was unfair because he knew defense counsel's method was proper and totally within the rules of evidence. Indeed, the duty to their clients dictated that the questions by posed in such a manner. Yet, the prosecutor saw fit to convey to the jury the totally false impression that the defense had concocted some diabolical scheme to prevent them from hearing evidence that, in his opinion, would conclusively show appellant's guilt. In the face of the lengthy colloquy that was had with the Court regarding the admissibility of the hearsay testimony, during which defense counsel put forth compelling evidentiary reasons for not allowing such testimony to be heard, the prosecutor's blatant suggestion to the jury that the defense had an improper motive was a conscious attempt to deceive and poison the jury's mind against the defendants and their counsel. See DeChristoforo v. Donnelly, 473 F2d 1236 (1st Cir., 1973).

But the truly damaging aspect of the prosecutor's argument is the invitation it presented to the jury to speculate as to what Finn would have testified to had he been alive. This blatant attempt to tell the jury that evidence existed of which they did not have the benefit but which showed appellant's guilt violates the most fundamental rule of fairness and is an intolerable abuse of the prosecutorial function. In effect, the jury was told that the death of Tony Finn was a great benefit to the defendant because as a result and through the operation of techincal legal rules the truly damaging evidence could not be put before them.

> A prosecutor may express his belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that

> there is other evidence known to the prosecutor but not introduced, justifying that belief.
>
> Henderson v. United States, 218 F2d 14, 19 (6th Cir., 1955)

The jury was then invited to consider the existence of this other evidence and to use their "common sense" - a thinly veiled suggestion to speculate - in placing it in context with the evidence introduced. Given the circumstantial nature of the case against appellant, and given the prejudice already engendered by the admission of the hearsay testimony/which the importance of was emphasised by these comments, the prosecutor's summation was the ultimate blow that insured appellant's conviction.

Appellant asserts with the implicit belief that these injudicious remarks by an able and experienced government attorney were designed to overcome the obvious weakness of his case. They were made for the purpose, and had the effect, of getting before the jury for its consideration extrinsic evidentiary material tending to show appellant's guilt of the offense charged. Hall v. United States, 419 F2d 582 (5th Cir., 1969). As such, they constitute prejudicial and reversible error and this Court must rectify this grevious wrong by reversing the conviction.

CONCLUSION

FOR THE ABOVE-STATED REASONS THE PETITION FOR RE-ARGUMENT AND REHEARING EN BANC SHOULD BE GRANTED

Respectfully submitted,

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